

DEPARTMENT OF STATE REVENUE

04-20140431.LOF

Letter of Findings Number: 04-20140431
Sales/Use Tax
For Tax Years 2008, 2009, and 2010

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Retail merchant was required to collect sales tax or, alternatively, obtain properly executed exemption certificates from customers who claimed their purchases were exempt from Indiana sales tax.

ISSUE**I. Sales Tax - Imposition: Exempt Sales.**

Authority: IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-2.5-8-8; IC § 6-2.5-9-3; IC § 6-8.1-5-1; Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Scopelite v. Indiana Dep't of Local Gov't Fin., 939 N.E.2d 1138 (Ind. Tax Ct. 2010); Wendt LLP v. Indiana Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax Ct. 2012); Indiana Dep't of State Revenue v. Caterpillar, Inc., 15 N.E.2d 579 (Ind. 2014); [45 IAC 2.2-8-12](#).

Taxpayer protests the Department's proposed assessments on certain sales, claiming some of its customers were exempt from sales tax.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. Taxpayer sells tangible personal property to its Indiana customers. In late 2012, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit for 2008, 2009, and 2010 tax years. The Department found that Taxpayer did not collect and remit sales tax on various Indiana retail transactions, nor did it obtain the properly executed exemption certificates from those customers who claimed the exemptions. During the audit, the Department permitted Taxpayer additional time to contact those customers to obtain the properly executed special exemption certificates, AD-70 forms. In the absence of the properly executed exemption certificates, the Department imposed additional sales tax and interest for the tax years at issue.

Upon receiving the audit proposed assessments, Taxpayer protested, arguing that the Department's assessments were overstated. Taxpayer submitted additional exemption certificates and a list of its customers to support its protest. Referring to the above documents, Taxpayer claimed that the sales concerning those customers were exempt from the sales tax. Upon reviewing the additional exemption certificates and the list, the Department agreed that Taxpayer is released from the sales tax liability on eleven customers.

Taxpayer continues to contend that it should be released from the tax liability concerning the remainder of the transactions as stated in its protest. An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax - Imposition: Exempt Sales.**DISCUSSION**

Prior to the hearing, the Department agreed that Taxpayer's documentation demonstrated that eleven customers were exempt. Thus, transactions related to those eleven customers will be removed from the assessments in a supplemental audit review. Taxpayer continues to contend that it should be released from the tax liability concerning the remainder of the transactions as stated in its protest. The issue in this case thus is whether the remainder of Taxpayer's documentation sufficiently demonstrated that its customers were exempt and Taxpayer

is released from the tax liability concerning various Indiana retail transactions.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012). Thus, the taxpayer is required to provide documentation explaining and supporting its challenge that the Department's assessment is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); see also *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

The Department's audit determined that Taxpayer failed to collect sales tax on various retail transactions or, as an alternative, to obtain the exemption certificates from the customers who claimed the statutory exemptions. Referencing the additional exemption certificates and a "twelve-page list" of its customers, Taxpayer argued that it was not responsible for collecting sales tax on sales to customers who were exempt. Specifically, Taxpayer claimed that the Department had agreed that the customers on that "twelve-page list" were exempt from sales tax. Taxpayer further contended that one of the exemption certificates should have applied to four customers which were distinct but related entities because the subsidiaries were divisions of that parent company.

After reviewing the documentation provided by Taxpayer, this Letter of Findings finds (1) that Taxpayer's remaining exemption certificates fail to demonstrate that those customers' purchases were exempt; (2) that Taxpayer's "twelve-page list" of its customers is not the same as "exemption certificates" on forms and in the manner prescribed by the Department, and (3) that three distinct but related entities were not entitled to share the exemption based on Taxpayer's assertion alone. As explained in detail below, this Letter of Findings addresses the issue as follows:

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (namely, a purchaser) is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). "The retail merchant shall collect the tax as agent for the state." *Id.*

IC § 6-2.5-4-1 (as in effect for tax years at issue), in relevant part, provides:

- (a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.

IC § 6-2.5-8-8 further provides the general rules for exemption certificates. "A person . . . , who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. IC § 6-2.5-8-8(a). **"The person shall issue the certificate on forms and in the manner prescribed by the department.** A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase." *Id.* (**Emphasis added**).

Additionally, "Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose." [45 IAC 2.2-8-12](#)(b). "An exemption certificate issued by a purchaser **shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.** [45 IAC 2.2-8-12](#)(f) (**emphasis added**).

Accordingly, sales of tangible personal property by retail merchants (i.e., sellers) are taxable, unless specifically exempt by a statute under IC § 6-2.5-5. The sellers are required to collect sales/use tax at the time of the transactions or, alternatively, to obtain properly executed exemption certificates from customers who claim the statutory exemptions.

In this instance, the Department's audit noted that Taxpayer sells tangible personal property to its customers in Indiana. Taxpayer thus is a retail merchant and should have collected and remitted the sales tax on those sales. Taxpayer did not do so. Nor did Taxpayer provide to the audit the properly executed exemption certificates, which it should have collected from its customers. The auditor was therefore unable to verify whether certain sales were exempt from the sales tax. The Department thus instructed Taxpayer to obtain properly executed special

exemption certificates, AD-70 forms. Without these properly executed special exemption certificates, Taxpayer as retail merchant is not relieved from its duty to collect the sales tax.

Throughout the protest process, Taxpayer claimed that the Department should have accepted the remaining exemption certificates and the "twelve-page list" of its customers because those transactions were exempt from sales tax. Taxpayer further maintained that the Department found the parent company's purchases were exempt and that exemption certificates should also have applied to the sales of three distinct but related entities because they were divisions of the parent company.

Taxpayer is mistaken. There is no dispute that Taxpayer is a retail merchant engaged in retail transactions (selling tangible personal property) in Indiana, which requires that Taxpayer collect and remit the sales tax to Indiana in regards to those sales unless a valid exemption certificate is presented. IC § 6-2.5-2-1(b); IC § 6-2.5-8-8. In the absence of the properly signed and executed exemption certificates, the Department's audit properly assessed sales tax on the otherwise taxable sales. Without the valid exemption certificates, Taxpayer is liable for the sales tax. IC § 6-2.5-9-3. Taxpayer's remaining exemption certificates demonstrate that Taxpayer is liable.

Taxpayer further erred in asserting that it was not required to collect additional valid exemption certificate from each customer on the "twelve-page list" because the auditor reviewed and accepted that list. In other words, Taxpayer believes that its "twelve-page list" substitutes for the valid exemption certificates prescribed by the Department. However, Taxpayer's "twelve-page list" is not a valid exemption certificate because that "twelve-page list" is not in the form or manner prescribed by the Department, as required under IC § 6-2.5-8-8 and [45 IAC 2.2-8-12](#). The plain language of the relevant legal authorities does not permit a taxpayer to create substitutions of the exemption certificates. *Indiana Dep't of State Revenue v. Caterpillar, Inc.*, 15 N.E.2d 579, 583 (Ind. 2014) (explaining that when a court "examine[s] a statute that an agency is 'charged with enforcing . . . [the courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party") (internal citations omitted). Pursuant to the Department's interpretation of the above referenced statutes and regulation, Taxpayer must obtain valid exemption certificates (including valid blanket exemption certificates) if the sales tax is not collected at the time of the sales of tangible personal property.

Taxpayer also erred in claiming that one of the exemption certificates it provided exempted sales to four distinct but related entities because the Department agreed that the parent company is exempt and that the other three entities were the divisions of the parent company. Taxpayer in this case, however, simply asserted that the remaining three entities were the divisions of the parent company without providing any supporting documentation. Without the verifiable documentation, the Department is not able to agree all three distinct entities, however related, should be afforded the same exempt status and thus should have been allowed the same exempt status. In other words, in the absence of the verifiable documentation, the Department is not able to agree that these three distinct entities were exempt.

Pursuant to [45 IAC 2.2-8-12\(b\)](#), "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose." [45 IAC 2.2-8-12\(d\)](#) also cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important for the seller to obtain an exemption certificate in order to avoid the necessity for such proof." In the absence of the properly signed and executed exemption certificates, the Department's audit properly assessed sales tax on the otherwise taxable sales.

There is no question that Taxpayer entered into retail transactions for which - absent an exemption - Taxpayer was required to collect sales tax. Taxpayer is reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained at the time the transaction occurs otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

FINDING

Taxpayer's protest of the eleven exempt customers is sustained subject to the results of the Department's supplemental audit review. The remainder of Taxpayer's protest is respectfully denied.

Posted: 03/25/2015 by Legislative Services Agency

